

AMENDED IN ASSEMBLY JUNE 16, 2016

AMENDED IN SENATE MAY 10, 2016

AMENDED IN SENATE APRIL 18, 2016

SENATE BILL

No. 885

Introduced by Senator Wolk

January 19, 2016

An act to amend ~~Section~~ *Sections 2782 and 2782.8* of the Civil Code, relating to contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 885, as amended, Wolk. ~~Construction contracts~~; *Contracts: design professionals*: indemnity.

Existing law makes specified provisions in construction contracts void and unenforceable, including provisions that purport to indemnify the promisee against liability for damages for death or bodily injury to persons, injury to property, or any other loss arising from the sole negligence or willful misconduct of the promisee or the promisee's agents who are directly responsible to the promisee, or for defects in design furnished by those persons.

This bill would specify, with certain exceptions, for ~~construction contracts and amendments to them~~ entered into on or after January 1, 2017, that a design professional, as defined, only has the duty to defend himself or herself from claims or lawsuits that arise out of, or pertain or relate to, negligence, recklessness, or willful misconduct of the design professional. The bill would prohibit these provisions from being construed to affect any duty of a design professional to ~~pay a reasonable allocated share of defense fees and costs with respect to claims and lawsuits alleging negligence, recklessness, or willful misconduct of the~~

~~design professional, as specified, defend any claims brought against him or her on an ongoing basis during their pendency or the design professional's obligation to reimburse reasonable defense costs incurred by other persons or entities, limited to the design professional's degree of fault, as determined by a court, arbitration, or negotiated settlement. The bill would provide that contracts and solicitation documents are deemed to incorporate its provisions by reference and would define claim to include a demand for money or services, lawsuit, or demand for arbitration.~~ The bill would prohibit waiver of these provisions and would provide that any clause, covenant, or agreement contained in, collateral to, or affecting a contract that requires a design professional to defend claims or lawsuits against other persons or entities is void and unenforceable. The bill would provide legislative findings and declarations in support of these provisions.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. The Legislature finds and declares all of the
- 2 following:
- 3 (a) Errors and omissions insurance for design professionals does
- 4 not provide coverage for the defense of claims against other persons
- 5 and other entities involved in construction projects.
- 6 (b) Requiring design professionals to defend claims against
- 7 other persons or other entities involved in construction projects
- 8 when insurance coverage is not available is unfair and contrary to
- 9 sound public policy.
- 10 (c) It is sound public policy for all persons and entities in
- 11 projects to defend themselves against claims of negligence or error.
- 12 (d) It is the intent of the Legislature in enacting this act to
- 13 prohibit indemnity agreements that require design professionals
- 14 to defend claims made against other persons or other entities
- 15 involved in construction projects.
- 16 SEC. 2. Section 2782 of the Civil Code is amended to read:
- 17 2782. (a) Except as provided in Sections 2782.1, 2782.2,
- 18 2782.5, and 2782.6, provisions, clauses, covenants, or agreements
- 19 contained in, collateral to, or affecting any construction contract
- 20 and that purport to indemnify the promisee against liability for
- 21 damages for death or bodily injury to persons, injury to property,

1 or any other loss, damage or expense arising from the sole
2 negligence or willful misconduct of the promisee or the promisee's
3 agents, servants, or independent contractors who are directly
4 responsible to the promisee, or for defects in design furnished by
5 those persons, are against public policy and are void and
6 unenforceable; provided, however, that this section shall not affect
7 the validity of any insurance contract, workers' compensation, or
8 agreement issued by an admitted insurer as defined by the
9 Insurance Code.

10 (b) (1) Except as provided in Sections 2782.1, 2782.2, and
11 2782.5, provisions, clauses, covenants, or agreements contained
12 in, collateral to, or affecting any construction contract with a public
13 agency entered into before January 1, 2013, that purport to impose
14 on the contractor, or relieve the public agency from, liability for
15 the active negligence of the public agency are void and
16 unenforceable.

17 (2) Except as provided in Sections 2782.1, 2782.2, and 2782.5,
18 provisions, clauses, covenants, or agreements contained in,
19 collateral to, or affecting any construction contract with a public
20 agency entered into on or after January 1, 2013, that purport to
21 impose on any contractor, subcontractor, or supplier of goods or
22 services, or relieve the public agency from, liability for the active
23 negligence of the public agency are void and unenforceable.

24 (c) (1) Except as provided in subdivision (d) and Sections
25 2782.1, 2782.2, and 2782.5, provisions, clauses, covenants, or
26 agreements contained in, collateral to, or affecting any construction
27 contract entered into on or after January 1, 2013, with the owner
28 of privately owned real property to be improved and as to which
29 the owner is not acting as a contractor or supplier of materials or
30 equipment to the work, that purport to impose on any contractor,
31 subcontractor, or supplier of goods or services, or relieve the owner
32 from, liability are unenforceable to the extent of the active
33 negligence of the owner, including that of its employees.

34 (2) For purposes of this subdivision, an owner of privately
35 owned real property to be improved includes the owner of any
36 interest therein, other than a mortgage or other interest that is held
37 solely as security for performance of an obligation.

38 (3) This subdivision shall not apply to a homeowner performing
39 a home improvement project on his or her own single family
40 dwelling.

(d) For all construction contracts, and amendments thereto, entered into after January 1, 2009, for residential construction, as used in Title 7 (commencing with Section 895) of Part 2 of Division 2, all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any construction contract, and amendments thereto, that purport to insure or indemnify, including the cost to defend, the builder, as defined in Section 911, or the general contractor or contractor not affiliated with the builder, as described in subdivision (b) of Section 911, by a subcontractor against liability for claims of construction defects are unenforceable to the extent the claims arise out of, pertain to, or relate to the negligence of the builder or contractor or the builder's or contractor's other agents, other servants, or other independent contractors who are directly responsible to the builder, or for defects in design furnished by those persons, or to the extent the claims do not arise out of, pertain to, or relate to the scope of work in the written agreement between the parties. This section shall not be waived or modified by contractual agreement, act, or omission of the parties. Contractual provisions, clauses, covenants, or agreements not expressly prohibited herein are reserved to the agreement of the parties. Nothing in this subdivision shall prevent any party from exercising its rights under subdivision (a) of Section 910. This subdivision shall not affect the obligations of an insurance carrier under the holding of *Presley Homes, Inc. v. American States Insurance Company* (2001) 90 Cal.App.4th 571. Nor shall this subdivision affect the obligations of a builder or subcontractor pursuant to Title 7 (commencing with Section 895) of Part 2 of Division 2.

(e) Subdivision (d) does not prohibit a subcontractor and builder or general contractor from mutually agreeing to the timing or immediacy of the defense and provisions for reimbursement of defense fees and costs, so long as that agreement does not waive or modify the provisions of subdivision (d) subject, however, to paragraphs (1) and (2). A subcontractor shall owe no defense or indemnity obligation to a builder or general contractor for a construction defect claim unless and until the builder or general contractor provides a written tender of the claim, or portion thereof, to the subcontractor which includes all of the information provided to the builder or general contractor by the claimant or claimants, including, but not limited to, information provided pursuant to

subdivision (a) of Section 910, relating to claims caused by that subcontractor's scope of work. This written tender shall have the same force and effect as a notice of commencement of a legal proceeding. If a builder or general contractor tenders a claim for construction defects, or a portion thereof, to a subcontractor in the manner specified by this provision, the subcontractor shall elect to perform either of the following, the performance of which shall be deemed to satisfy the subcontractor's defense obligation to the builder or general contractor:

(1) Defend the claim with counsel of its choice, and the subcontractor shall maintain control of the defense for any claim or portion of claim to which the defense obligation applies. If a subcontractor elects to defend under this paragraph, the subcontractor shall provide written notice of the election to the builder or general contractor within a reasonable time period following receipt of the written tender, and in no event later than 90 days following that receipt. Consistent with subdivision (d), the defense by the subcontractor shall be a complete defense of the builder or general contractor of all claims or portions thereof to the extent alleged to be caused by the subcontractor, including any vicarious liability claims against the builder or general contractor resulting from the subcontractor's scope of work, but not including claims resulting from the scope of work, actions, or omissions of the builder, general contractor, or any other party. Any vicarious liability imposed upon a builder or general contractor for claims caused by the subcontractor electing to defend under this paragraph shall be directly enforceable against the subcontractor by the builder, general contractor, or claimant.

(2) Pay, within 30 days of receipt of an invoice from the builder or general contractor, no more than a reasonable allocated share of the builder's or general contractor's defense fees and costs, on an ongoing basis during the pendency of the claim, subject to reallocation consistent with subdivision (d), and including any amounts reallocated upon final resolution of the claim, either by settlement or judgment. The builder or general contractor shall allocate a share to itself to the extent a claim or claims are alleged to be caused by its work, actions, or omissions, and a share to each subcontractor to the extent a claim or claims are alleged to be caused by the subcontractor's work, actions, or omissions, regardless of whether the builder or general contractor actually

1 tenders the claim to any particular subcontractor, and regardless
2 of whether that subcontractor is participating in the defense. Any
3 amounts not collected from any particular subcontractor may not
4 be collected from any other subcontractor.

5 (f) Notwithstanding any other provision of law, if a
6 subcontractor fails to timely and adequately perform its obligations
7 under paragraph (1) of subdivision (e), the builder or general
8 contractor shall have the right to pursue a claim against the
9 subcontractor for any resulting compensatory damages,
10 consequential damages, and reasonable attorney's fees. If a
11 subcontractor fails to timely perform its obligations under
12 paragraph (2) of subdivision (e), the builder or general contractor
13 shall have the right to pursue a claim against the subcontractor for
14 any resulting compensatory and consequential damages, as well
15 as for interest on defense and indemnity costs, from the date
16 incurred, at the rate set forth in subdivision (g) of Section 3260,
17 and for the builder's or general contractor's reasonable attorney's
18 fees incurred to recover these amounts. The builder or general
19 contractor shall bear the burden of proof to establish both the
20 subcontractor's failure to perform under either paragraph (1) or
21 (2) of subdivision (e) and any resulting damages. If, upon request
22 by a subcontractor, a builder or general contractor does not
23 reallocate defense fees to subcontractors within 30 days following
24 final resolution of the claim as described above, the subcontractor
25 shall have the right to pursue a claim against the builder or general
26 contractor for any resulting compensatory and consequential
27 damages, as well as for interest on the fees, from the date of final
28 resolution of the claim, at the rate set forth in subdivision (g) of
29 Section 3260, and the subcontractor's reasonable attorney's fees
30 incurred in connection therewith. The subcontractor shall bear the
31 burden of proof to establish both the failure to reallocate the fees
32 and any resulting damages. Nothing in this section shall prohibit
33 the parties from mutually agreeing to reasonable contractual
34 provisions for damages if any party fails to elect for or perform
35 its obligations as stated in this section.

36 (g) A builder, general contractor, or subcontractor shall have
37 the right to seek equitable indemnity for any claim governed by
38 this section.

39 (h) Nothing in this section limits, restricts, or prohibits the right
40 of a builder, general contractor, or subcontractor to seek equitable

1 indemnity against any supplier, design professional, or product
2 manufacturer.

3 (i) As used in this section, “construction defect” means a
4 violation of the standards set forth in Sections 896 and 897.

5 (j) (1) Commencing with ~~contracts all contracts, and~~
6 ~~amendments thereto~~, entered into on or after January 1, 2017, a
7 design professional, as defined in paragraph (2) of subdivision (c)
8 of Section 2782.8, shall only have the duty to defend himself or
9 herself from claims that arise out of, pertain to, or relate to the
10 negligence, recklessness, or willful misconduct of the design
11 professional. All provisions, clauses, covenants, and agreements
12 contained in, collateral to, or affecting any such contract that
13 purport to require a design professional to defend claims against
14 another party shall be unenforceable.

15 (2) Paragraph (1) does not prohibit a design professional from
16 mutually agreeing with another party to the timing or immediacy
17 of a defense and provisions for reimbursement of defense fees and
18 costs, ~~if so long as that subsequent agreement after a claim is made~~
19 does not waive or modify the provisions of paragraph (1).

20 (3) Paragraph (1) shall not be construed to ~~affect any~~ affect:

21 (A) Any duty of a design professional to ~~pay a reasonable~~
22 ~~allocated share of the defense fees and costs with respect to claims~~
23 ~~and lawsuits alleging negligence, recklessness, or willful~~
24 ~~misconduct of the design professional~~ *defend any claims brought*
25 *against him or her on an ongoing basis during their pendency;*
26 *including any amounts reallocated upon final resolution of a claim*
27 *or lawsuit, either by settlement or judgment.* ~~pendency.~~

28 (B) *The design professional’s obligation to reimburse*
29 *reasonable defense costs incurred by other persons or entities,*
30 *limited to the design professional’s degree of fault, as determined*
31 *by a court, arbitration, or negotiated settlement.*

32 (4) *All contracts and all solicitation documents, including*
33 *requests for proposal, invitations for bid, and other solicitation*
34 *documents, are deemed to incorporate by reference the provisions*
35 *of this subdivision.*

36 (5) *For purposes of this subdivision, “claim” means a claim,*
37 *demand for money or services, lawsuit, or demand for arbitration.*

38 (4)

39 (6) The provisions of this subdivision shall not apply to either
40 of the following:

1 (A) A claim, lawsuit, or arbitration demand where a
2 project-specific general liability policy insures all project
3 participants for general liability exposures on a primary basis and
4 also covers all design professionals for their legal liability arising
5 out of their professional services on a primary basis.

6 (B) A design professional who is a party to a written
7 design-build joint venture agreement.

8 ~~(5)~~

9 (7) The provisions of this subdivision shall not be waived or
10 modified by contract. Contract provisions in violation of this
11 subdivision are void and unenforceable. The duty of a design
12 professional to defend is limited as provided in this subdivision.

13 *SEC. 3. Section 2782.8 of the Civil Code is amended to read:*

14 2782.8. (a) For all contracts, and amendments thereto, entered
15 into on or after January 1, 2007, with a public agency for design
16 professional services, all provisions, clauses, covenants, and
17 agreements contained in, collateral to, or affecting any such
18 contract, and amendments thereto, that purport to ~~indemnify,~~
19 ~~including the duty and the cost to defend,~~ *indemnify* the public
20 agency by a design professional against liability for claims against
21 the public agency, are unenforceable, except for claims that arise
22 out of, pertain to, or relate to the negligence, recklessness, or willful
23 misconduct of the design professional. The duty to ~~indemnify,~~
24 ~~including the duty and the cost to defend,~~ *indemnify* is limited as
25 provided in this section. This section shall not be waived or
26 modified by contractual agreement, act, or omission of the parties.
27 Contractual provisions, clauses, covenants, or agreements not
28 expressly prohibited herein are reserved to the agreement of the
29 parties.

30 (b) All contracts and all solicitation documents, including
31 requests for proposal, invitations for bid, and other solicitation
32 documents, between a public agency and a design professional,
33 are deemed to incorporate by reference the provisions of this
34 section.

35 (c) For purposes of this section, the following definitions apply:

36 (1) "Public agency" includes any county, city, city and county,
37 district, school district, public authority, municipal corporation,
38 or other political subdivision, joint powers authority, or public
39 corporation in the state. Public agency does not include the State
40 of California.

1 (2) “Design professional” includes all of the following:

2 (A) An individual licensed as an architect pursuant to Chapter
3 3 (commencing with Section 5500) of Division 3 of the Business
4 and Professions Code, and a business entity offering architectural
5 services in accordance with that chapter.

6 (B) An individual licensed as a landscape architect pursuant to
7 Chapter 3.5 (commencing with Section 5615) of Division 3 of the
8 Business and Professions Code, and a business entity offering
9 landscape architectural services in accordance with that chapter.

10 (C) An individual registered as a professional engineer pursuant
11 to Chapter 7 (commencing with Section 6700) of Division 3 of
12 the Business and Professions Code, and a business entity offering
13 professional engineering services in accordance with that chapter.

14 (D) An individual licensed as a professional land surveyor
15 pursuant to Chapter 15 (commencing with Section 8700) of
16 Division 3 of the Business and Professions Code, and a business
17 entity offering professional land surveying services in accordance
18 with that chapter.

19 (d) This section shall only apply to a professional service
20 contract, or any amendment thereto, entered into on or after January
21 1, 2007.

22 (e) The amendments made to this section by the act adding this
23 subdivision shall apply to services offered pursuant to a design
24 professional contract, or any amendment thereto, entered into on
25 or after January 1, 2011.

26 (f) Nothing in this section shall abrogate the provisions of
27 Section 1104 of the Public Contract Code.